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NO. 82-1211

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1982

JAMES FRANCIS FRY and JIMMY RINCON MARTINEZ,
Petitioners

V.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER ARTICLE 14.04 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS, VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. WHETHER THERE EXISTED SUFFICIENT EXIGENT CIRCUMSTANCES AT THE TIME OF PETITIONERS' WARRANTLESS ARREST IN THEIR HOME TO OVERCOME THE PER SE UNREASONABLENESS OF SAID ARREST?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the Petition for Writ of Certiorari submits its Brief in Opposition:

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals appears as an appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Texas Court of Criminal Appeals by panel opinion reversed Petitioners' convictions on June 9, 1982, whereupon Respondent filed a motion for rehearing. The court below sitting *en banc* affirmed the convictions on October 6, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and th persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

Article 14.04, Code of Criminal Procedure of the State of Texas, V.A.C.C.P.:

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is not time to procure a warrant, such peace officer may, without a warrant, pursue and arrest the accused.

STATEMENT OF THE CASE

The Court is herein referred to pages in the transcription of trial testimony on file in the court below, *i.e.*, the Statement of Facts (SF). The Court is also referred to

the facts as set out in the opinion of the court below beginning at A-1 in the Appendix to the petition.

Petitioners were among four persons accused of committing aggravated robbery upon the complainant Robert Herdman on March 25, 1978, in Dallas, Texas. Herdman testified that upon taking William Paddock home at 3:00 a.m. on March 25, 1978, he was ordered, at gunpoint, into a house that was three blocks from his apartment. Thereafter, Herdman, according to his testimony, was beaten and robbed of all his money by four individuals over a period of approximately ten and one-half to eleven hours. Herdman was taken back to his apartment at 2:00 p.m. on the same day and reported what happened to Dallas Police Officer Swafford (SF 43-88).

Herdman's fiancee, Carol Hutrya, testified that two men attempted to burglarize Herdman's apartment earlier that morning around 5:00 a.m. She testified that one of the men was Paddock, whom Herdman had earlier left to take home, and the other was Petitioner Fry. Hutrya reported the incident to Officer Duesman and after they both drove around the neighborhood no car fitting the description of the one Herdman and Paddock left in earlier was found. She did not see Herdman again until around 2:00 p.m. when he returned to his apartment (SF 89-163).

Officer Duesman was given a description of the car by Hutrya. The license number was stated to him and that it was an out-of-state plate, possibly California. The car was a blue and white Chevrolet. Duesman made a written report and left it for his replacement watch (SF 164-186).

Investigator J. C. Arnold during the afternoon of March 25, 1978, received a call to proceed to 2833 Community Drive. He arrived there at approximately 3:00

p.m. (SF 212), and talked to Officer Swafford and then to Herdman (SF 213). Arnold talked to Herdman for about 30 to 40 minutes and afterward proceeded to a police ubstation where he phoned the Crimes Against Persons Section of the Dallas Police Department. Arnold requested additional manpower. He also told the sergeant on duty that he "knew where the suspects probably were", and that he "didn't have time to secure a warrant" (SF 215). After hearing the facts of the situation the sergeant agreed that there was not sufficient time in which to obtain an arrest warrant. Arnold also testified that on his way to the substation to call downtown he drove past 2415 Community Drive and saw the Chevrolet with California tags parked in front. After making the call he immediately went back to a position across the street from the suspects' house and "sat and watched the house" (SF 219). Further, Arnold stated that "I went over the near Community and Harry Hines where I could observe the house in case the people left" (SF 219). He stated that he watched the house approximately 25 to 30 minutes, and he "didn't see anything occur at the house (SF 220).

Upon arrival of a cover squad, Arnold and the other officers proceeded to the suspects' house at about 4:15 p.m. (SF 222). Arnold knocked on the door and identified himself as a police officer. When one of the other officers saw movement inside the house, Arnold kicked open the door. All four suspects, including Petitioners, were then arrested. Only Petitioner Martinez was awake when the police officers entered the house. At trial the following items, seized in Petitioners' home, were admitted into evidence over objection: a sawed-off shotgun, a shotgun, a rifle, a baseball bat, a wooden club, three spent tubes of toothpaste, a knife, a shotgun shell, and hair specimens. In addition, thirteen photographs of various parts of the house, which were taken at the time of the arrest, were admitted into evidence.

ARGUMENT ON QUESTIONS PRESENTED

I. WHETHER ARTICLE 14.04 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS, VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

A. This Court Should Not Consider An Issue Not Previously Raised In The Court Below.

The opinion of the court below begins with the following statement:

> The appellants do not challenge the sufficiency of the evidence. In their sole ground of error they contend that certain evidence admitted at their trial was the product of an illegal search and seizure.

(Petitioners' Brief at A-3).

It is clear that the question of the constitutionality of the Texas Court of Criminal Appeals interpretation of Article 14.04 of the Code of Criminal Procedure has never been raised or addressed in the court below.

The cases are legion that this Court cannot decide issues raised for the first time on petition for writ of certiorari or on appeal and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long standing nature of the rule: "[I]n *Crowell v. Randell,* 10 Pet. 368 (183), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion

that the judiciary act of 1789, C. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails' 10 Pet 368, 391." *Cardinale v. Louisiana, supra* at 391. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point.

Petitioners have never raised the issue of the constitutionality of Article 14.04, Texas Code of Criminal Procedure either at trial or on appeal. The state courts have not had an opportunity to pass on the validity of this state provision. Comity and judicial economy dictate that Petitioners not be permitted to present this issue for the first time in their petition for writ of certiorari.

B. The Court of Criminal Appeals' Application Of Article 14.04 V.A.C.C.P. Is Not An Issue Worthy Of Certiorari.

Petitioners argue that the Texas Court of Criminal Appeals has been inconsistent in its application of Article 14.04 to fact situations involving warrantless arrests. This does not present a federal question. As Petitioners have correctly pointed out:

> Whether the lower court is consistent in applying Article 14.04 is not one which would necessarily invoke the authority of this Court...

(Petitioner's Brief at 10). The only time where this Court's jurisdiction might be invoked is when the lower courts interpret state rules in a manner that does not meet federal constitutional standards with regard to the petition before the court when the issue has been properly presented to the court. Petitioners have failed to satisfy these basic conditions.

II. THERE EXISTED SUFFICIENT EXIGENT CIRCUMSTANCES AT THE TIME OF PETITIONERS' ARREST IN THEIR HOME TO JUSTIFY SAID ARREST.

A. A Fact Question is Not Sufficient To Invoke This Court's Jurisdiction.

Petitioners are raising a question as to the sufficiency of the evidence, which is a question unworthy of this Court's review. Even if it were error to determine that the facts of this case comport with the requisite Article 14.04 VACCP and clearly establish that the requisite exigent circumstances were present, thus satisfying Federal Constitutional requirements, this Court does not sit to correct individual injustices.

The Texas Court of Criminal Appeals, *en banc*, obviously, considered the applicability of Article 14.04 VACCP and the federal constitutional requirements. Petitioners' issue is not sufficiently important to justify this Court's exercise of jurisdiction.

B. Whether Sufficient Exigent Circumstances Existed To Justify The Warrantless Arrests At Issue Here Is A Fact Question Unworthy Of This Court's Attention.

In order to be valid the arrest of Petitioners, being without warrant and in their own home, must fall within one of the exceptions based on the presence of exigent circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Payton v. New York*, 455 U.S. 573 (1980); *Dorman v. United States*, 435 F.2d 385 (D.C. Cir, *en banc*, 1970).

In considering the issue of exigent circumstances, Petitioners "readily admit that most of the circumstances are successfully met by the State". There is

no question that a grave offense was involved; that the suspects were heavily armed, that there was strong reason to believe that the suspects were in the premises, and the entry was made in the daytime rather than at night. Petitioners further admit that there was a clear showing of probable cause including "reasonably trustworthy information upon which a magistrate could have issued a warrant".

The only issue, dealing with exigent circumstances, challenged by Petitioner is the "likelihood of escape". Petitioners argue that because the house was under surveillance "they were already, in effect, prisoners and unable to escape". The fact that one police officer had a house, containing four armed and dangerous men, under surveillance, hardly establishes that there was no likelihood of escape.

The likelihood of escape must be judged based on the information available at the time of arrest, and not by hindsight, which is always crystal clear. Herdman told the investigating officer that:

> They all just said they was leaving. Some of them said they was going back to California. And Martinez — when he took me home that day, he said that he was going to leave just as soon as he got back.

Petitioners seem to feel that because two hours and fifteen minutes had passed from the time Herdman was freed until the Petitioners were arrested that the likelihood of escape was somehow reduced. The more logical and realistic view is that with the passing of every minute, escape was increasingly more likely. This is particularly true in light of the fact that one of the Petitioners had stated he was leaving immediately after he freed Herdman.

Petitioners also seem to place some importance on the fact that Herdman took a shower before he reported the crime to the police. First, contrary to Petitioners' assertion that Herdman took a shower, the record clearly shows that Herdman had just walked into his apartment when he was met by his girlfriend and the investigating police officer. Even if Herdman did take a shower, it would seem perfectly understandable given his ordeal. While Herdman was held captive for over ten hours he was repeatedly beaten with fists, a chain belt, a baseball bat, beer cans, and the butt of a rifle. Further, Herdman was brutally kicked after being beaten to the floor, beer was poured on him, two men urinated on his face, and paint was sprayed and toothpaste was smeared in his hair. If Herdman took a shower, it shows nothing more than that he was treated in an inhumane manner and subjected to vile and depraved humiliations; a situation where any normal person would have desperately wanted a shower. Whether or not Herdman took a shower, however, has absolutely nothing to do with the likelihood of escape.

As the Texas Court of Criminal Appeals *en banc* pointed out:

> [2] Even stronger are the facts in this case, where it is undisputed that the robbery victim reported to investigating officers that one of the robbers told him "Just as soon as he got back and packed his stuff up, he was leaving," and that several of the robbers said they were leaving for California that day. This clearly was sufficient to constitute a report "that the other offender is about to escape, so that there is not time to procure a warrant." *It is also sufficient to show exigent circumstances authorizing a warrantless arrest under Texas and federal constitutional law.*

(Petitioners' Brief at A 35; emphasis added)

C. Sufficient Exigent Circumstances Existed to Justify The Warrantless Arrest.

Petitioners contend that there would have been no delay in obtaining an arrest warrant and that because no attempt was made to obtain a warrant, the arrest was unreasonable. This assertion is clearly not supported by the facts. As the panel opinion of the Texas Court of Criminal Appeals points out:

> Arnold left Herdman's apartment about 3:30 p.m. and drove to a nearby police substation. He called the Crimes Against Persons Section downtown and requested additional manpower to assist him in arresting the four men described by Herdman. He told the sergeant on duty that he "knew where the suspects probably were" and that he "didn't have time to secure a warrant."
>
> After making the call, Arnold drove to a position near the house. He kept it under surveillance until the back-up officers arrived about thirty minutes later. During that time Arnold saw nothing occur at the house.
>
> About 4:15 p.m., Arnold and the other officers surrounded the house. Arnold knocked on the door and identified himself as a police officer. When one of the other officers saw movement inside the house, Arnold kicked open the door. All four men were then arrested, and numerous weapons and other items were seized.

(Petitioner's Brief at A5).

It is clear that there was only a forty-five minute lapse from the time the suspects were first located until they were apprehended. Most of this time was spent in arranging for officers to assist in effecting the arrest.

The decision that there was not sufficient time within which to obtain a warrant was based on several factors. First, the men were heavily armed and dangerous. Second, the men had clearly indicated their intent to leave as soon as possible. Third, the police were made aware of the suspects' intent to leave by a reliable source. Fourth, when Officer Arnold called the station he discussed the situation with his sergeant, who testified that he had been on the police force for twenty years. Based on the information available and the extensive experience of the officers involved, it was determined that there was not sufficient time within which to obtain a warrant. This decision was, without question, reasonable. It was not a decision based on "inarticulate hunches and suspicions. . .".

CONCLUSION

Petitioners did not raise the issue of the constitutionality of Article 14.04, V.A.C.C.P. below, and may not raise it for the first time in their petition for writ of certiorari. Further, the facts of this case clearly establish that there were exigent circumstances which met all the requisites of the Fourth Amendment of the United States Constitution for a warrantless arrest.

Respectfully submitted,

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